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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 184

THOMAS E. YOUNG,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Raising the same fundamental issues as *Payne* v. *Madigan*, No. 180, the decision of the Court of Appeals sanctioned petitioner's continued federal imprisonment despite the failure of the sentencing court to specify clearly the commencement dates of petitioner's sentences on multiple indictments. Approval by the court below of such defective sentencing practices thus requires reaffirmation by this Court of the meticulously precise standards to be followed by trial courts in executing their solemn responsibility to impose criminal sentences.

Opinions Below

The opinion of the Court of Appeals (R. 31-36) is reported at 274 F.2d 698 (8th Cir. 1960). The opinion of the District Court (R. 21-29) is reported at 174 F. Supp. 422 (D. N.D. 1959).

Jurisdiction

The Judgment of the Court of Appeals (R. 37) was entered on February 11, 1960. A motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari were filed on March 1, 1960, and both the motion and petition were granted on June 27, 1960 (R. 38). Counsel for petitioner was appointed by this Court on October 10, 1960. The jurisdiction of this Court is founded on 28 U.S.C. §1254(1).

Question Presented

Recognizing that the judicial pronouncement of sentence in open court did not specify the commencement dates of any of the five separate sentences imposed in three distinct criminal proceedings or declare their sequence, the Court of Appeals inferred these elements "on the basis of reasonable and natural understanding" flowing from the "manner" of the trial judge's imposition of sentence (R. 36).

Since criminal sentences must be imposed in the defendant's presence with "meticulously precise language," the central question presented is whether a sentencing pronouncement which omits to state the commencement dates of multiple criminal sentences may be cured by reference to a "reasonable and natural understanding" arising from the judge's "manner" in dealing with multiple indictments.

Statutes and Rules Involved

Rule 20, Federal Rules of Criminal Procedure:

> A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district.

Rule 32, Federal Rules of Criminal Procedure:

> (a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.
>
> (b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The

judgment shall be signed by the judge and entered by the clerk.

Rule 43, Federal Rules of Criminal Procedure:

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

Statement

On October 31, 1952, petitioner and his wife appeared before the District Court for the District of North Dakota, Southeastern Division, for arraignment and sentencing on pleas of guilty to six counts of two separate informations and one indictment, which charged violations of diverse federal statutes by petitioner and his wife on three separate occasions (R. 1-4).[1]

After receiving a plea of guilty in No. 8136 and noting similar pleas entered a year earlier in No. 8052 and No. 8048 (R. 6), the district judge sentenced petitioner to confinement "for a period of five years" on the first count of the information in No. 8048, and stated that he "also be confined on Count 2 for a period of five years" (R. 11). "As to case No. 8052," the judge declared that petitioner "be

[1] The two-count information in No. 8048 was filed October 31, 1951 and alleged two joint violations of 18 U.S.C. §2115 by the defendants (R. 1). The amended information in No. 8052 was filed November 30, 1951 and accused petitioner of violating 18 U.S.C. §2312 (R. 2). The first count of the indictment in No. 8136, filed September 27, 1952, alleged a joint violation of 18 U.S.C. §2312 by the defendants, whereas both the second and third counts stated a separate violation by one of the defendants of 18 U.S.C. §751 (R. 3-4).

confined for a period of five years" (R. 11). On the first count of No. 8136, the judge stated that each of the defendants "be confined for a period of five years," and on the second count the judge imposed another five-year term of imprisonment upon petitioner (R. 11).

Concluding its pronouncement, the court stated without amplification "that these sentences be served consecutively, which means for you, Mr. Young, a total sentence of 25 years . . ." (R. 12).[2]

On June 19, 1959 (R. 21-29), the district court denied petitioner's motion that the Judgments and Commitments prepared after the judicial proceeding, which specified definite commencement dates for each of the various sentences, be revised to conform with the oral pronouncement of sentence in petitioner's presence (R. 20).[3] The court concluded that they did not depart "in any matter of substance" from the declaration in open court (R. 25). Stressing the fact that the sentences were announced "case by case, and count by count" (R. 28), the court found "neither serious uncertainty nor uncertainty in any respect" in the pronouncement of sentence (R. 28), and felt that it was the "clear and obvious intention and direction" of the sentencing court "that the sentences imposed upon Young and his wife were to be served in the order pronounced" (R. 28). Moreover, the court viewed the provision in the Judgment and Commitment in No. 8048 that the two sentences were "to run consecutively *with* each other" as denoting consecutive *to* each other, quoting authority that "American-English has wide play in the joints, and a predilection for a particular

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[2] Similarly, petitioner's wife was sentenced to five year terms on both counts of No. 8048, and the first and third counts of No. 8136 (R. 11).

[3] Although the motion was signed only by petitioner, the district court's opinion regarded it as made by both defendants (R. 21).

preposition to express a relationship may go against usage if the choice of preposition results in meaningful language" (R. 22-23, 27).

Although recognizing that sentences on multiple indictments must be clearly specified, the Court of Appeals for the Eighth Circuit affirmed. The court rejected as "arbitrary and artificial" the principle that sentences on multiple indictments "cannot at all have any consecutive or successive operation, unless the court expressly specifies the sequence in which they are to be served" (R. 35).

According to the court, moreover, the failure of the sentencing court to make the "detailed and precise" determination of the commencement date of each sentence contained in the subsequently prepared Judgments and Commitments was cured by the "manner" in which the sentencing court "dealt with" the several criminal proceedings (R. 33, 36). Since "each indictment was taken up by the court in its chronological order, identification was made of it by its individual docket number, and sentence was pronounced in relation to it before consideration was engaged in of the next proceeding," and the sentencing court also referred to the sentences to be served "consecutively," the Court of Appeals held that the sentencing pronouncement, "on the basis of reasonable and natural understanding," directed that the sentences be served in the order in which they were pronounced (R. 35, 36).

Granting that "the language of the judgment and commitment thus was more detailed and precise than that of the pronouncement," the Court of Appeals nevertheless viewed it as being "without any departure, except in its form, from the plain indication of intent, significance and operativeness reflected by the pronouncement in its whole" (R. 33).

Summary of Argument

Federal judges must execute their solemn sentencing function in accord with fundamental procedural safeguards designed to protect the rights of the accused and to preserve public confidence in the administration of criminal justice.

To ensure minimal standards of clarity, this Court's *Daugherty* opinion in 1926 stressed that the trial judges should impose sentence with "meticulously precise language." Particularly where sentences are simultaneously imposed on multiple indictments, the sentencing judge is required to make an unequivocal determination of when each term of imprisonment is to begin and the order in which the sentences are to be served.

The court below approved a pronouncement of sentence which failed to comply with these essential requirements of judicial clarity. Acknowledging that the trial judge had failed to make any *express* declaration of the commencement dates of petitioner's sentences, the Court of Appeals dismissed such a requirement as "an absolute and artificial rule," and permitted this vital element of petitioner's sentences to be inferred "on the basis of reasonable and natural understanding" from the "manner" under which the sentencing judge "dealt with" the several indictments.

The sentencing pronouncement sanctioned below does not measure up to those high standards which this Court enforces in the administration of criminal justice in the federal courts. The judge's failure to make an express determination of an essential element of petitioner's sentences on *multiple indictments* violates the principle of Mr. Justice Bradley's *Patterson* opinion, as preserved in this Court's

subsequent *Daugherty* doctrine that criminal sentences should be declared with "meticulously precise language."

Moreover, the collateral circumstances culled by the Court of Appeals to justify an inference of the order of service from the sentencing judge's "manner" cannot rationally bridge the void between the judge's failure to fix the sequence of multiple sentences and the later rationalization to run them in "the order pronounced."

Especially in light of the more specific requirements of sentencing sequence approved for use in the federal courts by Form 25 of the Federal Rules of Criminal Procedure, this Court should reaffirm that the judicial pronouncement of sentence in open court is a solemn responsibility to be executed according to the most rigorous standards of judicial clarity and dignity.

ARGUMENT

I.

A Judicial Pronouncement Simultaneously Imposing Criminal Sentences on Several Diverse Indictments Must Specify the Commencement Date of Each Sentence to Be Served.

Courts imposing sentences of imprisonment exercise a solemn responsibility subject to sharply limited appellate review.[4] More than thirty years ago this Court sought to ensure the exercise of this discretion in a manner calculated to protect the rights of the accused and to preserve public confidence in the administration of criminal justice. Thus

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[4] See discussion in Brief for Petitioner, pp. 10-11, *Payne* v. *Madigan*, No. 180.

in *United States* v. *Daugherty*, 269 U.S. 360, 363 (1926), this Court stressed that sentences must be stated with "meticulously precise language," and emphasized that "Especial care is essential where sentences for crime are imposed." *Id.* at 364.[5]

Compliance with such rigorous standards of clarity requires that courts imposing simultaneous sentences on diverse indictments specify the commencement date of each sentence so that the sequence of service is clear. Because any sentence of imprisonment ordinarily commences to run from the date the defendant is delivered into the custody of the appropriate officials, regardless of the number of sentences imposed, any departure from this established practice through the court's discretionary exercise of its power to postpone the service of a criminal sentence must be clearly enunciated in the presence of the defendant.[6]

The particular requirements for the imposition of multiple sentences on diverse indictments were early and authoritatively set forth in Justice Bradley's opinion in *United States* v. *Patterson*, 29 Fed. 775 (C.C. D. N.J. 1887). Criticizing an oral pronouncement of sentence on three indictments which provided that "Said terms [were] not to run concurrently," Justice Bradley held that such a declaration was "uncertain and incapable of application," and defective because it omitted to state the commencement date of the sentence on each indictment by "specifying the order

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[5] As acutely observed in *Simunov* v. *United States*, 162 F.2d 314, 315 (6th Cir. 1947), "It is imperative in maintaining respect for the judgments of courts that sentences in criminal cases should not be equivocal. This is more vital than the interests of a particular defendant in a criminal case."

[6] See 18 U.S.C. §3568, and the more extensive development of this point in Brief for Petitioner, pp. 11-12, *Payne* v. *Madigan*, No. 180.

in which they were to run." *Id.* at 778. Hence, *Patterson* reaffirmed the established doctrine that multiple sentences pronounced simultaneously are presumed to run from the date of their imposition, in the absence of a clear and specific direction to the contrary by the judge. *Ibid.*[7]

This Court's later opinion in the *Daugherty* case confirms that sentences imposed on *multiple indictments* must clearly direct an order of service. Although tolerating a lesser standard of specificity for sentences pronounced on the numbered counts of a *single indictment*, *Daugherty* reaffirmed the *Patterson* rule for cases involving separate criminal indictments. *United States* v. *Daugherty*, 269 U.S. 360, 363 (1926).

While the distinction drawn by Mr. Justice McReynolds' *Daugherty* opinion may be supported by the differences between prosecution of *multiple* indictments and multiple counts of a *single* indictment,[8] *Daugherty's* broader doctrine may in any event be superseded today. The Judgment and Commitment form attached as Form 25 to the Federal Rules of Criminal Procedure provides for an express specification of the commencement date of each sentence imposed with reference to any other sentence, even where based on multiple counts of a single indictment. Even though not mandatory in nature, Form 25 reflects an authoritative judgment that less uncertainty is appropriate in the imposition of criminal sentences than *Daugherty* had tolerated twenty years before.

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[7] See also, *e.g.*, *United States* v. *Denemark*, 138 F.2d 289 (7th Cir. 1943); *Hode* v. *Sanford*, 101 F.2d 290 (5th Cir. 1939); *Biddle* v. *Hall*, 15 F.2d 840 (8th Cir. 1926).

[8] See the discussion at pp. 13-14 in Brief for Petitioner, *Payne* v. *Madigan*, No. 180.

II.

The Decision Below Improperly Inferred the Commencement Dates of Petitioner's Sentences From the Judge's Overall "Manner" in Handling the Multiple Indictments.

Although the sentencing court here failed to make any determination of the commencement dates of the several sentences to be served by petitioner, the Court of Appeals improperly permitted this basic element to be left to surmise from the overall "manner" in which the court "dealt with" the diverse criminal proceedings.

In simultaneously imposing on petitioner five-year terms on *five counts of three separate indictments* and informations, the judge's pronouncement failed to define the commencement dates of the sentences in any specific sequence. Admittedly "the language of the judgment and commitment thus was more detailed and precise than that of the pronouncement . . . " (opinion below, R. 33). The uncertainty left by the judge's directive was compounded by the obscure Judgment and Commitment in Case No. 8048 ordering the two sentences "to run consecutively *with* each other" (R. 17).[9]

Disparaging any requirement of an express specification as "an absolute and artificial rule" (R. 35), the Court of

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[9] Compare *Bledsoe* v. *Johnston*, 154 F.2d 458 (9th Cir. 1946), *cert. denied*, 328 U.S. 872 (1946) (provisions that each of two sentences is "to run consecutively with" the other held ineffective); *Biddle* v. *Hall*, 15 F.2d 840 (8th Cir. 1926) (provisions that each of two sentences is to start on a specific date and "not to run concurrent with" the other held ineffective). Even assuming that "consecutive with" may be considered equivalent to "consecutive to", the defect remains, since, in the absence of a prescribed sequence, separate sentences cannot be served "consecutive *to each other*" with any greater ease than they can be served "consecutive with each other."

Appeals inferred from the "manner" of the sentencing judge that petitioner was to serve his sentences in the same "chronological" order in which they were imposed. In the court's view, the *Patterson* rule did not apply because the sentencing court in this case "took up the indictments separately and meted out punishment on them in their chronological order," and illuminated "the intent, relationship and significance of what was being done" by its direction "that these sentences be served consecutively" (R. 35-36), and totalled twenty-five years for petitioner. From this, the court felt, flowed the "reasonable and natural understanding" that the judge meant the sentences to be served in the same order in which the separate indictments had been "dealt with" during the sentencing proceeding.

But the essential details of criminal sentences omitted by the judge cannot be implied by the "reasonable and natural understanding" flowing from his "manner" of "dealing with" consolidated indictments. A judge's handling of diverse criminal proceedings in "chronological order" scarcely warrants the inference that the sentences imposed on each indictment are to be served consecutively in the "order" in which they are imposed. For neither the numbers assigned to the proceeding by the clerk nor the chronology of the statutory violations underlying multiple indictments can bear any rational relationship to the factors ordinarily considered in a judge's exercise of his plenary sentencing powers in separate criminal proceedings.[10]

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[10] It is not wholly clear whether the "chronological order" emphasized by the Court of Appeals (R. 35) pertained to the "numerical order" of the separate proceedings or to the chronology of the violations charged. As demonstrated by the *Payne* case, the numerical order of the cases does not necessarily relate to the *chronology* of the alleged offenses. Brief for Petitioner, p. 4 n. 1, *Payne* v. *Madigan*, No. 180.

In sum, the inferences sanctioned by the Court of Appeals cannot compensate for the failure of the sentencing court's pronouncement to specify the commencement dates for the various sentences. Since "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment," *Bell* v. *United States*, 349 U.S. 81, 83 (1955), courts surely cannot "resolve doubts" in a judge's inadequate sentencing pronouncement by resort to any "reasonable and natural understanding" radiated by his "manner" of handling separate indictments.

Nor, as detailed in Part III of petitioner's brief in *Payne* v. *Madigan*, may the written forms of Judgment and Commitment, prepared in defendant's absence, furnish the missing elements of sentences as pronounced by the judge in open court.

Conclusion

For the above reasons, as well as those presented in more detail by petitioner's brief in the companion case of *Payne* v. *Madigan*, No. 180, the decision below should be reversed and remanded with direction that the petitioner, having served his lawful sentence, be discharged from imprisonment forthwith.[11]

Respectfully submitted,

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[11] As construed in accord with Mr. Justice Bradley's *Patterson* opinion, the sentencing pronouncement authorizes no more than *five* years of imprisonment. Since petitioner has been imprisoned for more than *ten* years with appropriate statutory deductions, he is entitled to release from any further illegal detention.

The sentencing court is obviously barred from sentencing petitioner so as to increase his sentence after its original imposition and start of service, owing to the prohibition against double jeopardy of the Fifth Amendment. *United States* v. *Benz*, 282 U.S. 304 (1931); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). The lower courts have often rejected belated efforts to cumulate criminal sentences where the original oral pronouncement did not so provide. *Duggins* v. *United States*, 240 F.2d 479 (6th Cir. 1957); *United States* v. *Chiarella*, 214 F.2d 838 (2d Cir. 1954), *cert. denied*, 348 U.S. 902 (1954); *Rutledge* v. *United States*, 146 F.2d 199 (5th Cir. 1944).

SUPREME COURT OF THE UNITED STATES

Nos. 180 and 184.—October Term, 1960.

Harry Joseph Payne, Petitioner, 180 *v.* Paul J. Madigan, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
Thomas E. Young, Petitioner, 184 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 5, 1961.]

Per Curiam.

The judgments are affirmed by an equally divided Court.

Mr. Justice Frankfurter took no part in the consideration or decision of these cases.